FILE COPY

Office-Supreme Court, U.S.
FILED
DEC 18 1958
JAMES R. BROWNING, Clerk

No. 525

In the Supreme Court of the United States

OCTOBER TERM, 1958

ARNOLD WILLIAM LEIFER, GEORGE FREDERICK CARNES AND JOHN HENRY MCFARLAND, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

J. LEE RANKIN,
Solicitor General,
MALCOLM ANDERSON,
Assistant Attorney General,
BEATRICE ROSENBERG,
EUGENE L. GRIMM,
Attorneys,
Department of Justice, Washington 25, D. C.

INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Statute involved	2
Statement	4
1. As to petitioner Loifer	5
2. As to petitioner Carnes	11
3. As to petitioner McFarland	15
Argument	20
Conclusion	25

CITATIONS

Cases:	
Blalock v. *United States*, 247 F. 2d 615	23
Bouziden v. *United States*, 251 F. 2d 728, certiorari denied, 356 U. S. 927	23
Cox v. *United States*, 332 U. S. 442	22
Dickinson v. *United States*, 346 U. S. 389	21, 22
Estep v. *United States*, 327 U. S. 114	21
Gonzales v. *United States*, 348 U. S. 407	22
Jencks v. *United States*, 353 U. S. 1	23
Sicurella v. *United States*, 348 U. S. 385	8, 21
Simmons v. *United States*, 348 U. S. 397	22
Tomlinson v. *United States*, 216 F. 2d 12, certiorari denied, 348 U. S. 970	21
United States v. *Nugent*, 346 U. S. 1	19, 22, 23
Witmer v. *United States*, 348 U. S. 375	21
Statutes:	
Universal Military Training and Service Act, 62 Stat. 604, as amended:	
Sec. 6 (j) (50 U. S. C. App. 456 (j))	2
Sec. 12 (a) (50 U. S. C. App. 462 (a))	5
18 U. S. C. (Supp. V) 3500	19, 23

490689—58——1

In the Supreme Court of the United States

OCTOBER TERM, 1958

No. 525

ARNOLD WILLIAM LEIFER, GEORGE FREDERICK CARNES AND JOHN HENRY MCFARLAND, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The Court of Appeals did not write opinions in these cases. Its reasons for affirmance were set out in the separate judgments (Pet. 37–40).

JURISDICTION

The judgments of the Court of Appeals as to all three petitioners were entered on October 22, 1958 (LR 12b, CMR 170–172).[1] The petition for a writ of

[1] The record in the *Leifer* case, consisting of the appendices to the briefs filed by the parties in the court below, will be referred to as "LR". The record in the *Carnes* and *McFarland* cases will be referred to as "CMR".

certiorari was filed on November 18, 1958. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether the classification of petitioners by the Selective Service System as available for noncombatant service (Leifer and McFarland) and as available for unrestricted service (Carnes) had basis in fact.

2. Whether the District Court erred in quashing petitioners' subpoenas *duces tecum* calling for the production of F. B. I. reports.

STATUTE INVOLVED

Universal Military Training and Service Act, 62 Stat. 604, as amended:

> Section 6 (j) [50 U. S. C. App. 456 (j)]:
>
> Nothing contained in this title [sections 451-454 and 455–471 of this Appendix] shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form. Religious training and belief in this connection means an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological, or philosophical views or a merely personal moral code. Any person claiming exemption from combatant training and service because of such conscientious objections whose claim is sustained by the local board shall, if he is in-

ducted into the armed forces under this title [said sections], be assigned to noncombatant service as defined by the President, or shall, if he is found to be conscientiously opposed to participation in such noncombatant service, in lieu of such induction, be ordered by his local board, subject to such regulations as the President may prescribe, to perform for a period equal to the period prescribed in section 4 (b) [section 454 (b) of this Appendix] such civilian work contributing to the maintenance of the national health, safety, or interest as the local board may deem appropriate and any such person who knowingly fails or neglects to obey any such order from his local board shall be deemed, for the purposes of section 12 of this title [section 462 of this Appendix], to have knowingly failed or neglected to perform a duty required of him under this title [sections 451–454 and 455–471 of this Appendix]. Any person claiming exemption from combatant training and service because of such conscientious objections shall, if such a claim is not sustained by the local board, be entitled to an appeal to the appropriate appeal board. Upon the filing of such appeal, the appeal board shall refer any such claim to the Department of Justice for inquiry and hearing. The Department of Justice, after appropriate inquiry, shall hold a hearing with respect to the character and good faith of the objections of the person concerned, and such person shall be notified of the time and place of such hearing. The Department of Justice shall, after such hearing, if the objections are found to be sus-

tained, recommend to the appeal board that (1) if the objector is inducted into the armed forces under this title [said sections], he shall be assigned to noncombatant service as defined by the President, or (2) if the objector is found to be conscientiously opposed to participation in such noncombatant service, he shall in lieu of such induction be ordered by his local board, subject to such regulations as the President may prescribe, to perform for a period equal to the period prescribed in section 4 (b) [section 454 (b) of this Appendix] such civilian work contributing to the maintenance of the national health, safety, or interest as the local board may deem appropriate and any such person who knowingly fails or neglects to obey any such order from his local board shall be deemed, for the purposes of section 12 of this title [section 462 of this Appendix], to have knowingly failed or neglected to perform a duty required of him under this title [sections 451–454 and 455–471 of this Appendix]. If after such hearing the Department of Justice finds that his objections are not sustained, it shall recommend to the appeal board that such objections be not sustained. The appeal board shall, in making its decision, give consideration to, but shall not be bound to follow, the recommendation of the Department of Justice together with the record on appeal from the local board. * * *.

STATEMENT

Petitioner Leifer seeks review of a judgment affirming his conviction in the United States District Court

for the Northern District of Ohio, Eastern Division, for refusal to submit to induction into the armed forces for noncombatant service, in violation of Section 12 (a) of the Selective Service Act, 62 Stat. 604, 50 U. S. C. App. 462 (a) (LR 2a, 10b). He was found guilty by the court without a jury and, on November 1, 1957, was sentenced to two years' imprisonment (LR 45a, 11b).

Petitioners Carnes and McFarland seek review of judgments affirming their convictions in the United States District Court for the Eastern District of Kentucky for refusal to submit to induction into the armed forces,[2] in violation of Section 12 (a) of the Selective Service Act, 62 Stat. 604, 50 U. S. C. App. 462 (a) (CMR 2–3). They were found guilty by the court following trial without a jury and each was sentenced to two years' imprisonment on February 26, 1958 (CMR 153, 161, 163).

The evidence pertaining to each petitioner may be summarized as follows:

1. As to petitioner Leifer

a. On July 30, 1951, petitioner Leifer, who was then 18 years of age, registered under the selective service laws (LR 10a). He filed his questionnaire on December 19, 1951, stating, *inter alia,* that he had been ordained a minister of Jehovah's Witnesses in 1942 (when he was 8 years old) and that he began what he

[2] Carnes was classified for combatant service; McFarland for noncombatant service (CMR 159).

called his full-time ministry on December 1, 1951 (LR 11a). He stated further that he worked about 20 hours per week as a "saw sharpener" sharpening "band and circular saws" and that he was a high school graduate. Petitioner signed the space in which conscientious objectors indicate their desire to be furnished the special form for persons of that persuasion (LR 12a–13a) and indicated that he believed he should be classified 4–D as a minister (LR 14a).

In his special form for conscientious objectors, filed on March 11, 1952, petitioner stated that he was opposed to participation in both combatant and noncombatant service because "one ordained cannot turn aside from his covenant to preach, for any reason: the covenant [which he entered by joining Jehovah's Witnesses] requires faithful preaching, even to the point of death" (LR 19a). He asserted a belief in the use of force under certain circumstances—to protect his family or his ministry, for example (LR 22a). He explained that he was raised as a Jehovah's Witness by his parents (LR 22a), had signified his "desire" to serve the Almighty God Jehovah "by public water immersion" in 1942 (LR 19a), and had attended his local "Theocratic Ministry School" for eight years (LR 19a). Petitioner answered "no" to the question whether he had given public expression to his views regarding conscientious objection (LR 24a). He summed up his views as follows (LR 20a):

> Rendering military service is done unto Caesar and is contrary to God's law which

requires me to take my stand as a minister with conscientious objections, notwithstanding the fact that I am not a pacifist.

On March 25, 1952, petitioner was classified I–A, eligible for induction for combat training, by unanimous vote of his local board (LR 14a). His request for a personal appearance before the local board was granted (LR 14a). Petitioner essentially repeated his answers to the questionnaire on April 23, 1952 during the course of his personal appearance before the board. He again stated that a person who has made a covenant to preach must remain at his preaching in time of war, and that he intended to keep himself apart from conflicts between nations because these wars "are not sanctioned by God" (LR 1b–2b). He said that he spent about 100 hours each month in furthering the work of Jehovah's Witnesses by street preaching, home calls, and distribution of written material (LR 2b–3b), and again asked to be classified "4–D as an ordained minister" (LR 6b). Petitioner expressly stated that he did not want to be classified as eligible for noncombatant training (I–A–O) or as eligible for civilian work contributing to a national interest (I–O). "I cannot turn aside from this covenant to preach for any reason" (LR 6b–7b). On April 29, 1952, the I–A classification was continued and petitioner appealed (LR 15a).

Petitioner appeared before a hearing officer of the Department of Justice on November 10, 1953. At that time petitioner was working about 20 hours each

week as a salesman. The résumé of an investigative report considered at that time noted that petitioner's former teachers, fellow-employees, neighbors and friends believed that petitioner was sincere in his religious beliefs. He was active in the works of the Jehovah Witnesses, at that time devoting approximately 65 hours each month thereto (LR 30a–32a). Petitioner told the hearing officer that he could not work as a minister in a camp or work in a hospital to alleviate suffering because those duties would hinder his ministry or conflict with his ministerial duties (LR 32a). The hearing officer concluded that petitioner was sincere in his beliefs and recommended that his claim be sustained. The Department of Justice overruled this recommendation, however, on the ground that, although petitioner was a sincere Jehovah's Witness, his beliefs did not include non-participation in war in any form, and recommended that petitioner's objections to combatant and noncombatant service be rejected (LR 33a). The appeal board accordingly classified petitioner I–A on December 8, 1953 (LR 34a).

Petitioner's classification was reopened on June 13, 1955, and he was again classified I–A by his local board (LR 15a).[3] Petitioner was given a second

[3] At the time when the Department of Justice first recommended rejection of petitioner's claims it was believed that willingness to participate in theocratic warfare was a sufficient basis to deny a claim of conscientious objection to participation in war in any form. The decision of this Court in *Sicurella* v. *United States*, 348 U. S. 385, necessitated reconsideration of all classifications based on that ground (LR 37a).

personal hearing and the I–A classification was confirmed. Once again he appealed, and the appeal board again referred the file to the Department of Justice for a recommendation (LR 16a).

Petitioner appeared before a hearing officer for the second time on July 26, 1956. The hearing officer found no substantial change in petitioner's earlier beliefs. Petitioner stated, however, that he devoted only about 16 hours per month to religious activities at that time but again sought exemption as a minister. He stated that "if he was found to be a conscientious objector, he would refuse to serve in any civilian capacity, even for the public health, safety or welfare, so long as it was in compliance with an order of the United States Government." The hearing officer again concluded that petitioner was sincere in his beliefs and recommended that he be granted a I–O classification. The Department of Justice recommended that petitioner be classified I–A–O, since his only objection to noncombatant training was that it would interfere with his ministry (LR 35a–37a).

On September 25, 1956, the appeal board classified petitioner as I–A–O. At that time the board had before it the entire file, which included a résumé of two investigative reports. Petitioner had received a copy of this résumé from the hearing officer and had received a copy of the recommendation of the Department of Justice almost two months before the appeal board acted (LR 39a–40a, 8b). The résumé supported the conclusion that petitioner was

a sincere Jehovah's Witness. Although invited to do so, petitioner did not file a reply to the Department of Justice recommendation (LR 17a).

At trial it was stipulated that petitioner was examined and found physically fit for induction, and that he reported as ordered but refused to submit to induction (LR 9b).

b. Prior to trial petitioner Leifer subpoenaed "the complete F. B. I. report that was made when * * * [his] case was before the Department of Justice * * *" (LR 3a). At trial he made a motion for judgment of acquittal alleging, *inter alia,* the same ground (LR 41a). The government's motion to quash the subpoena *duces tecum* was granted and petitioner's motion for acquittal was denied (LR 44a).

In an oral statement delivered at the close of trial, the trial court ruled that there was evidence from which the appeal board could conclude that petitioner was opposed to noncombatant service because it would conflict with his ministerial duties; that there was thus a basis for the board's conclusion that petitioner was not conscientiously opposed to noncombatant service because of religious belief; and that the court therefore had no right to upset the classification made by the appeal board (LR 10b–11b). On appeal, the court below agreed that an objection to noncombatant service on the ground that it would interfere with proselytizing activities is not the type of conscientious objection to noncombatant service to which Section 6 (j) refers (LR 12b).

2. As to petitioner Carnes

a. Petitioner Carnes, then 18 years of age, registered with his local draft board on January 28, 1952, and filed his questionnaire on February 9, 1953 (CMR 35–36). At that time he stated, *inter alia,* that he was a full-time high school student and a part-time janitor at a local Lutheran church (CMR 37–38). He did not sign the space provided for those who wish to indicate conscientious opposition to participation in war in any form by reason of religious training and belief (CMR 39). On March 4, 1953, the local board deferred petitioner as a student until June 1954, his expected date of graduation (CMR 39).

Carnes filed his special form for conscientious objectors on July 19, 1954 (CMR 41). At that time he stated that he was opposed to participation in both combatant and noncombatant service, although not a pacifist, and asked for exemption as either a minister or a conscientious objector. He expressed a belief in the use of force as a means of self defense and to protect his loved ones and home. He said that he began to study the Bible and the literature of the Watchtower Bible and Tract Society in October, 1952, dedicated himself "to the will of Jehovah" in January, 1954, and regarded himself as a "minister" since that time (CMR 42–43, 49). According to petitioner, he devoted about 55 hours per month to his ministerial work of street preaching and pamphlet distribution, was neutral toward the affairs of the world, and was

not willing to perform the "governmental work required of men who are conscientious objectors" since he could not turn aside from his ministerial duties (CMR 48–49). In an affidavit filed to support his claim as a conscientious objector, petitioner further detailed his status. He said he had attended his congregation's Theocratic Ministry School since September, 1953. "I am not a pioneer or full time minister of the Watchtower Society but I am ordained and recognized as a part time or congregational publisher. * * * My preaching activities in which I am engaged in entitle me to exemption from performing military training and service in the Armed Forces of the nation. The exempt status that I have also relieves me from performing governmental work * * * for I am a minister of the gospel * * *" (CMR 51-52). Petitioner appeared in person before the board on September 8, 1954, and substantially repeated the facts set out in his conscientious objector form and written affidavit. It was brought out at that time that petitioner lived with his mother, who was a Baptist, and that he was not authorized by the Jehovah's Witnesses to administer the ordinances of public worship (CMR 52–53). The local board classified petitioner as I–A that same day. He appealed, and the appeal board requested an advisory recommendation from the Department of Justice (CMR 40, 54).

Petitioner was granted a hearing on December 11, 1954 (CMR 59). The hearing officer reported that he was not particularly impressed with petitioner's sin-

cerity in his claim of being a conscientious objector, observing that "the registrant appeared to be intelligent, but his answers to questions put to him indicated that he gave only answers which he thought would be most beneficial to his claim as a conscientious objector, whether or not they were truthful." The hearing officer accordingly recommended that registrant's claim as a conscientious objector opposed to both combatant and noncombatant military service be rejected (CMR 60).

In reaching his recommendation, the hearing officer took into consideration the résumé of an investigative report. The résumé indicated that petitioner was an excellent student in high school, was considered honest, trustworthy, reliable, and likely to be sincere in his religious beliefs by his part-time employer, and was well thought of by his neighbors. In particular, his neighbors regarded him as a very quiet, well-behaved young man who had few friends, attended no social functions, and seemed devoted to the study and teachings of the Jehovah's Witnesses during the past three years. The résumé also mentioned that, according to an official of the Jehovah's Witnesses, each member of the sect reaches his own decision as to military service (CMR 61–63).

In its report to the appeal board, the Department of Justice noted that, although in his special form for conscientious objectors petitioner claimed that he began to study the literature of the Jehovah's Witnesses in October, 1952, his questionnaire, filed in January, 1953, made no mention of the fact, nor did he claim

to be a conscientious objector at that time (CMR 59). It was also observed that petitioner attended Bible School at the Lutheran church where he worked until March 1954 (CMR 58). On this basis, and in view of the hearing officer's personal observations, the Department concurred in the hearing officer's recommendation (CMR 60). Four affidavits, signed by 38 Jehovah's Witnesses attesting to their belief in petitioner's sincerity and to his status as a part-time preacher, were attached to the Department's recommendation and forwarded to the appeal board (CMR 64–68).

In a reply to the recommendation of the Department of Justice, filed May 27, 1955, petitioner attempted to explain the facts stated in the recommendation, disputed the inferences to be drawn therefrom, and questioned the motives and fairness of the hearing officer. He also requested the full F. B. I. report (CMR 69–71).

On July 18, 1955, the appeal board by unanimous vote classified petitioner I–A, making him eligible for unrestricted military duty (CMR 72).

Petitioner then asked his local board to furnish him with a copy of the F. B. I. report and of the recommendation of the hearing officer (CMR 73). On August 15, 1955, the board declined to do so. It pointed out that petitioner had received a copy of the résumé of the F. B. I. report and a copy of the recommendation by the Department of Justice, and thus was in possession of all the information considered by the appeal board (CMR 76–77).

Petitioner Carnes was ordered to report for induction on November 6, 1956. On November 20, 1956, he refused to submit to induction (CMR 77–79).

b. Prior to trial petitioner subpoenaed the complete F. B. I. report in his case but the subpoena was quashed on motion on January 8, 1958 (CMR 3–4, 5). At trial, it was stipulated that the petitioner had refused to be inducted (CMR 31).

3. As to petitioner McFarland

a. Petitioner McFarland became 18 years of age on August 14, 1950, and registered with his local board three days later (CMR 79). About a year thereafter, on August 24, 1951, he filed his questionnaire, claiming that he had been ordained as a minister in 1941, at the age of 8, and requesting that he be classified IV-D as a minister of the Watchtower Bible and Tract Society (CMR 80–81, 86). At that time petitioner was employed by a paper company, working 52 hours each week, and was attending his local Theocratic Ministry School. He requested exemption as a conscientious objector if not as a minister (CMR 81–83). Petitioner amplified his position in an affidavit filed with the questionnaire. As a Jehovah's Witness, he regarded himself as in the world but not of it, and conscientiously objected to "serving in the armies of the evil world of Satan. As soldiers of God they [the Witnesses] cannot engage in the conflicts and warfare that flow from the affairs of this world. They * * * must be at their missionary post of duty" (CMR 90).

Petitioner McFarland also filed a special form for conscientious objectors on August 24, 1951. In that form he asserted an objection to both combatant and noncombatant service, claiming that he believed in using force only when authorized to do so by Jehovah (CMR 81–92). He had been raised as a Jehovah's Witness by his parents and had attended his local ministry school since 1943 (CMR 93–96).

In October 1951, jurisdiction over petitioner was transferred to a different local board (CMR 97), which classified him as I–A on November 13, 1951 (CMR 84). Petitioner protested, asked for a personal interview, and submitted an affidavit and a second special form for conscientious objectors (CMR 98–100) (this being a revised form superseding all others (CMR 101)). Once again he claimed a belief that obedience to Jehovah is superior to any human relation. He explained that he believed in the use of force to defend "Jehovah's kingdom, property, preaching, meetings, brothers and sisters" (CMR 101) and that he preached "the Gospel of the Kingdom from house to house and publicly" (CMR 104). Because of his dedication to Jehovah God, he said, "I am * * * no part of this world which is governed by the political system. * * * I tell officials of the Government that I conscientiously object to serving in any military establishment or any civilian arrangement that substitutes for Military Service" (R. 107). In line with this, petitioner refused to elect to perform either noncombatant military or civilian work contributing to the maintenance of the national health, safety, or in-

terest if exemption as a conscientious objector was granted (CMR 100–101). When the local board directed petitioner to elect one or the other he again refused, saying that to agree to perform any kind of service would violate his covenant with Almighty God and hinder him in carrying out his ministerial duties (R. 108–110). In a personal appearance on March 10, 1952, petitioner stated that he was opposed to contributing to war in any form (R. 112–113). His I-A classification was continued and petitioner appealed (R. 84, 113). The case was referred to the Department of Justice for a recommendation.

The hearing officer found that petitioner's claim as a conscientious objector was not well taken. He considered the résumé of an investigative report which revealed that, although petitioner's employers and fellow employees regarded him as of good character and reputation, he had never voiced his views as a Jehovah's Witness or as a conscientious objector. The résumé mentioned that, according to his assistant company servant, petitioner had not been very active in religious work and was not well enough known by him to be recommended. Moreover, the résumé continued, petitioner's mother had been heard to say that she would use any means to keep petitioner out of the service. Nonetheless, the résumé concluded that all persons interviewed regarded petitioner as sincere in his religious beliefs. Petitioner orally admitted to the hearing officer that he had only recently become more active in religious work. The Department of

Justice recommended that the claim for exemption be rejected (CMR 116, 117, 132–134).

On October 13, 1952, the appeal board classified petitioner as I–A. He was ordered to report for induction on December 11, 1952 but refused to submit to induction (CMR 84–85, 118–119).

Petitioner's file was reopened on May 3, 1955, and he was again classified I–A. Petitioner requested a personal appearance to reassert his claim to exemption as a minister and as a conscientious objector (CMR 85, 121–122). At his second appearance, petitioner was permitted to refute or explain, point by point, the adverse matters contained in the investigative report (CMR 125–126). The local board, however, adhered to the I–A classification on July 5, 1955. Petitioner appealed a second time and requested that he be furnished the complete F. B. I. report (CMR 85, 127–128).

At his second hearing before a hearing officer, it was shown that McFarland had been active in religious work for the preceding three years. Petitioner claimed there had been no change in his position as a conscientious objector. Although the hearing officer concluded that petitioner was not sincere in his claim, the Department of Justice disagreed, concluding that petitioner was sincerely opposed to combatant service and recommended that he be classified I–A–O, for noncombatant military training (CMR 129–131). A résumé of a second investigation made in 1955 disclosed nothing unfavorable to petitioner's claim of conscientious opposition to combatant military service (CMR 134–136).

Petitioner was given an opportunity to reply to the recommendation and stated merely that he did not agree with it. The appeal board classified him in I-A-O (CMR 137–139). He was ordered to report for induction on October 17, 1956. Petitioner reported as ordered but refused to submit to induction (CMR 20–21, 140–141).

Petitioner obtained a subpoena *duces tecum* for the complete F. B. I. report prior to trial but the subpoena was quashed on motion by the government (CMR 4–6).

b. After all of the evidence had been presented and before entering his findings, the trial judge delivered an oral opinion. He concluded that the burden was on petitioners Carnes and McFarland to establish their claimed exemptions, and that there was evidence to support the I–A classification of Carnes and the I-A-O classification of McFarland by the draft boards (CMR 155, 158–159). He held that under *United States* v. *Nugent*, 346 U. S. 1, and 18 U. S. C. (Supp. V) 3500, petitioners were not entitled to receive the entire investigative report, but only the résumé which they had received (CMR 154–158), stating in this connection (CMR 155–156):

> They have this résumé, which in these particular cases says that certain investigations were made * * *. Whether they knew who the people were that made those statements about them or not is after all not entirely material. They could rebut it by showing it was not true. * * * And so, he is not denied anything, he is

not denied an opportunity to make out his case * * *.

During the course of his oral opinion, the district judge noted that ministers of religion are not exempted as such because of personal reasons, but because of the service which they do for their congregations. At that point defense counsel interposed to say that petitioners Carnes and McFarland grounded their objection "on their conscientious objections to war, rather than to being a minister" (CMR 156). On appeal, the Court of Appeals affirmed for the reasons stated in the trial judge's oral opinion (CMR 170–172).

ARGUMENT

1. *a.* As to petitioners Liefer and McFarland, there is no issue as to the sincerity of their adherence to the tenets of their sect. Their classification as I–A–O constitutes a determination by the selective service boards that the petitioners do have sincere personal religious scruples against killing and "taking up carnal weapons" entitling them to exemption from bearing arms. The boards have found merely that their religious scruples against killing are not the reason for their refusal to do *non*combatant work. These two petitioners made clear, not once but many times, that they were unwilling to perform noncombatant military service—or indeed, any service of any sort—only because they were unwilling to interrupt their street-preaching and tract-distributing activities.

This objection to service is not recognized by the Universal Military Training and Service Act. *Tomlinson* v. *United States*, 216 F. 2d 12, 18 (C. A. 9), certiorari denied, 348 U. S. 970.[4] There was thus evidence to support the selective service classification. *Dickinson* v. *United States*, 346 U. S. 389, 396; *Estep* v. *United States*, 327 U. S. 114, 122.

b. As to petitioner Carnes, the trial court properly found that there was evidence from which the selective service boards could conclude that he did not have sincere scruples against killing. Carnes did not claim that he had such conscientious scruples when he completed his questionnaire in late January, 1953, although he later claimed that he had been studying the teachings of the Jehovah's Witnesses since October, 1952. The hearing officer who saw and interviewed this petitioner came to the conclusion that he was not sincere. The ultimate question with respect to petitioner Carnes is the same as that presented in *Witmer* v. *United States*, 348 U. S. 375. It "is the sincerity of the registrant in objecting, on religious grounds, to participation in war in any form. * * * [A]ny fact which casts doubt on the veracity of the registrant is relevant. * * * If, as here, the issue is the registrant's sincerity and good faith belief, then

[4] Certiorari was denied in the *Tomlinson* case two weeks after this Court had held in *Sicurella* v. *United States*, 348 U. S. 385, that belief in theocratic warfare and the use of force in self-defense is not inconsistent with religious scruples against killing.

there must be some inference of insincerity or bad faith" (348 U. S. at 381–382).[5]

The trial judge properly held that resolution of issues of sincerity and credibility was for the selective service authorities.

2. Since this Court's decision in *United States* v. *Nugent*, 346 U. S. 1, it has been settled that a registrant must be furnished by the hearing officer, upon request, a fair résumé of any unfavorable evidence against him, but that he is not entitled to see the investigative report or be informed of the names of persons interviewed by the investigator. *Simmons* v. *United States*, 348 U. S. 397, spelling out the requirements of a fair résumé, and *Gonzales* v. *United States*, 348 U. S. 407, holding that a registrant must be given a copy of the recommendation by the Department of Justice and afforded an opportunity to reply

[5] The claim by each petitioner that he was entitled to classification as a minister was essentially a statement of the position rejected by this Court in *Cox* v. *United States*, 332 U. S. 442, 444–446, that all members of Jehovah's Witnesses are ministers. Their files show that they were members of various groups of congregants who engaged in door-to-door and street religious observances, part-time Bible studies, the giving of occasional student discourses, and other similar group endeavors. They did not practice these activities as a "vocation" (*Dickinson* v. *United States*, *supra*, 346 U. S. at 395), nor were they in any sense leaders of a "religious faith" (*id.*, p. 394). Their roles appear to have been exactly the same as those of all other members of their religious company. Clearly they were not pastors or company servants. Their vocations were secular, as academic student or wage earner, and their earnings were for personal support, not to advance a ministry. Indeed, Carnes and McFarland waived this claim at trial (CMR 156).

to the recommendation, have not impinged upon the authority of *Nugent, supra.* The *Nugent* holding is therefore justification for the procedure followed in these cases.

The argument that the decision in *Jencks* v. *United States,* 353 U. S. 657, weakened the effect of *Nugent* has been rejected by the various Courts of Appeals in which that contention has been raised. *Blalock* v. *United States,* 247 F. 2d 615 (C. A. 4); *Bouziden* v. *United States,* 251 F. 2d 728, 730–732 (C. A. 10), certiorari denied, 356 U. S. 927. See the Government's brief in opposition in the *Bouziden* case, No. 804, October Term, 1957. The *Jencks* decision by its terms is applicable only to pretrial statements made by persons called as adverse witnesses by the prosecution during the course of trial. Since that decision, Congress has made even clearer by statute, 18 U. S. C. (Supp. V) 3500, that demand for production of F. B. I. reports must be based on the testimony of a witness at the trial.

The recommendation of the Department of Justice, which is itself merely advisory to the appeals board, cannot be deemed the equivalent of the testimony of a prosecution witness. The only question before the trial court to which the recommendation relates is whether there was basis in fact for the classification. Reports which are never given to the Selective Service Board cannot show that the Board acted arbitrarily.

There is a further reason for concluding that the demand for production of the F. B. I. reports raises no real issue in these cases. As to petitioners Leifer and Carnes, the résumé was entirely favorable to their claim of being conscientious objectors to killing. As to McFarland, those portions of the résumé which were unfavorable were not relied upon by the Department of Justice or the appeal board, since petitioner McFarland was found to be a sincere Jehovah's Witness. Each of the petitioners was given a résumé of the reports and each was given a copy of the Department of Justice recommendation and invited to comment thereon (see the Statement, *supra* pp. 9–10, 14, 19). Leifer did not reply; Carnes substantially admitted that the facts stated in the recommnedation were accurate, since he attempted to explain them and dispute the inferences drawn therefrom; and McFarland merely noted his objection to the recommendation. The issues as to the validity of the classifications do not turn on the F. B. I. reports.

CONCLUSION

The petition for a writ of certiorari presents essentially factual issues primarily dependent upon the specific circumstances of each case. The extensive administrative procedures which were followed have been carefully scrutinized by the courts below and found to be fair. There is no conflict of decision. It is therefore respectfully submitted that the petition should be denied.

J. LEE RANKIN,
Solicitor General.
MALCOM ANDERSON,
Assistant Attorney General.
BEATRICE ROSENBERG,
EUGENE L. GRIMM,
Attorneys.

DECEMBER 1958.

U. S. GOVERNMENT PRINTING OFFICE 1959